

THE PROSECUTOR'S MANUAL
Chapter 21
VICTIMS' RIGHTS

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APAAC Prosecutor's Manual
Chapter 21
Victims' Rights

I. INTRODUCTION

In 1990, Arizona amended its constitution to give crime victims certain rights within the criminal justice process. Article 2, section 2.1 of the Arizona Constitution, commonly known as the Victims' Bill of Rights (hereinafter referred to as "VBR"), defines who is a victim for purposes of the enumerated rights, gives the state legislature the authority to enact substantive and procedural laws to implement the VBR and sets forth 12 enumerated rights:

To preserve and protect victims' rights to justice and due process, a victim of crime has a right:

1. To be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process.
2. To be informed, upon request, when the accused or convicted person is released from custody or has escaped.
3. To be present at and, upon request, to be informed of all criminal proceedings where the defendant has the right to be present.
4. To be heard at any proceeding involving a post-arrest release decision, a negotiated plea, and sentencing.
5. To refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant.
6. To confer with the prosecution, after the crime against the victim has been charged, before trial or before any disposition of the case and to be informed of the disposition.
7. To read pre-sentence reports relating to the crime against the victim when they are available to the defendant.
8. To receive prompt restitution from the person or persons convicted of the criminal conduct that caused the victim's loss or injury.
9. To be heard at any proceeding when any post-conviction release from confinement is being considered.
10. To a speedy trial or disposition and prompt and final conclusion of the case after the conviction and sentence.

11. To have all rules governing criminal procedure and the admissibility of evidence in all criminal proceedings protect victims' rights and to have these rules be subject to amendment or repeal by the legislature to ensure the protection of these rights.

12. To be informed of victims' constitutional rights.

Ariz. Const. art. 2, § 2.1(A). Pursuant to the authority granted it in the Constitution, the state legislature enacted several substantive and procedural laws codified in Title 13, Chapter 40 of the Arizona Revised Statutes (A.R.S. § 13-4401 et seq.).

The purpose of the constitutional provision and its related statutes is to protect and preserve the rights guaranteed to crime victims by ensuring they are given due notice throughout the criminal process, have their privacy protected and are paid restitution if the defendant is convicted. (Laws 2007, Ch. 290, §§ 13). Victim's rights laws shall be liberally construed to preserve and protect the rights to which victims are entitled. A.R.S. § 13-4418.

II. VICTIM, DEFINED

A. Arizona Constitution

Victim is defined in the Arizona Constitution as “a person against whom the criminal offense has been committed or, if the person is killed or incapacitated, the person's spouse, parent, child or other lawful representative, except if the person is in custody for an offense or is the accused.” Ariz. Const. art. 2, § 2.1(B).

B. A.R.S. § 13-4401

The implementing statute follows the constitutional provision with two exceptions in cases of death or incapacitation of the person against whom the crime was committed: (1) it expands the list of persons who may invoke a victim's rights to include grandparents, siblings, and any other person related to the person by consanguinity or affinity to the second degree; and (2) it prohibits the person's spouse, parent, child, grandparent, sibling, other person related to the person by consanguinity or affinity to the second degree or other person from invoking victim's rights if that person is in custody or the accused.

C. Applicable Criminal Offenses

1. Criminal Offenses, Defined

VBR provisions apply only in “criminal offense” cases, meaning felonies and misdemeanors involving physical injury, the threat of physical injury or a sexual offense. A.R.S. § 13-4401(6). However, the reduction of a charge from a felony to a misdemeanor after indictment does not deprive a victim of the protection of the VBR. *State ex rel. Thomas v. Klein*, 214 Ariz. 205, 207, 150 P.3d 778, 780 (App. Div. 1 2007).

2. Victimless Crimes

On the other hand, a “victimless crime” is one “which generally involves only the criminal, and which has no direct victim.” *State v. Sorkhabi*, 202 Ariz. 450, 453, 46 P.3d 1071, 1074 (App. Div. 1 2002), citing Black's Law Dictionary 1567-68 (6th ed.1990). When there is no direct victim, victims’ rights will not apply.

3. Specific Victim Crimes

Interfering with Judicial Proceedings. A protected party under a domestic-violence order of protection may exercise victims’ rights when the defendant is charged with interfering with judicial proceedings by violating that order of protection. *Douglass v. State*, 219 Ariz. 152, 155, 195 P.3d 189, 192, (App. Div. 1 2008).

Bigamy, where neither wife had consented to the other marriage to the defendant. *State v. Guadagni*, 218 Ariz. 1, 6, 178 P.3d 473,478 (App. Div.2 2008).

Resisting arrest. *State v. Sorkhabi*, 202 Ariz. 450, 453, 46 P.3d 1071, 1074 (App. Div. 1 2002).

Driving under the influence, where the defendant was involved in a collision with the owner/driver of another automobile. *State ex rel. Romley v. Superior Court In and For County of Maricopa*, 184 Ariz. 409, 411, 909 P.2d 476, 478, (App. Div. 1 1995).

Leaving the Scene of an Injury Accident. *State ex rel. Smith v. Reeves*, __ P.3d __, 2011 WL 700524 (March 1, 2011).

4. Dismissed Counts

If a criminal offense against a victim has been dismissed as the result of a plea agreement in which the defendant is pleading to other charges, the victim of the dismissed counts, on request, may continue to exercise all the applicable rights of a crime victim throughout the criminal justice process. A.R.S. § 13-4402.01(A).

D. Who may invoke victims’ rights?

A victim does not have to be named in the indictment to be considered a victim for VBR purposes. *State v. Sarullo*, 219 Ariz. 431, 435, 199 P.3d 686, 690 (App. Div. 2 2008)(child who was sleeping next to his mother when she was assaulted was burglary victim even though he was not named in the indictment). The Arizona Supreme Court has defined who is given victim status as:

a person who witnesses a crime against others and is also victimized by the same defendant on the same occasion ... But the victim of crime number 1 who is a witness but not a victim of crime number, committed by the same defendant on

another occasion, may be compelled to grant an interview regarding crime number 2. Stated differently, those who are not victims but merely witnesses of particular criminal behavior, though perhaps victims of other behavior by the same defendant on separate occasions, may be interviewed as to the former but not the latter.

Champlin v. Sargeant, 192 Ariz. 371, 375, 965 P.2d 763, 767(1998).

1. When the Victim is Deceased

Spouse of a murder victim. *Lynn v. Reinstein*, 205 Ariz. 186, 68 P.3d 412, (2003).

Parents of the deceased victim. *State v. Superior Court In and For County of Maricopa*, 186 Ariz. 363, 366, 922 P.2d 927, 930 (App. Div. 1 1996).

2. Victim's Parents

a. Parents of a Minor Victim

A.R.S. § 13-4433(H) permits the parent or legal guardian of a minor victim who exercises victims' rights on behalf of the minor to also exercise all victims' rights on their own behalf. The parent or guardian may exercise victims' rights on behalf of the child regardless of whether or not the charged criminal conduct caused the child's death. *State ex rel. Smith v. Reeves*, __ P.3d __, 2011 WL 700524 (March 1, 2011)(defendant charged with leaving the scene of an accident that resulted in child's death).

The statutory right includes the right to refuse an interview on the parent or legal guardian's own behalf, not just on behalf of the minor. *Lincoln v. Holt*, 215 Ariz. 21, 26, 156 P.3d 438, 443 (App. Div. 1 2007).

A minor crime victim also has the right to a parent's presence at trial, even if the parent will testify and the rule allowing exclusion of witnesses from the courtroom has been invoked. *State v. Uriarte*, 194 Ariz. 275, 278, 981 P.2d 575, 578 (App. Div.1 1998).

b. Parents of a Deceased Victim

The standard for demonstrating that the alleged crime killed the victim, so that the parents of a victim may assert rights under the VBR requires a showing of causation, which is something more than just any nexus. *State v. Superior Court In and For County of Maricopa*, 186 Ariz. 363, 366, 922 P.2d 927, 930 (App. Div. 1 1996)(victim's suicide after sexual assault as a result of failure to receive support from co-workers was insufficient nexus to the defendant's crime to permit parents to invoke victim status).

3. Uncharged Coconspirators

An unnamed and uncharged coconspirator is not an “accused” person who would be ineligible for victim status under the VBR. *Knapp v. Martone*, 170 Ariz. 237, 239, 823 P.2d 685, 687 (1992).

4. Victims in Custody

A person in custody for an offense is expressly excluded from the definition of victim in the VBR. Ariz. Const. art. 2, § 2.1(B). The Arizona Court of Appeals has defined the phrase “in custody for an offense” to exclude only those who were incarcerated at the time the crime against them was committed. A victim who is out of custody at the time the offense was committed but is subsequently incarcerated retains his constitutional rights while in custody. *State v. Nichols*, 224 Ariz. 569, 573, 233 P.3d 1148, 1152 (App. Div. 2 2010).

Rule 39 of the Arizona Rules of Criminal Procedure grants victims in custody the right to be heard and a limited means by which to invoke the right. See section III(H), *infra*. In granting this right, the Arizona Supreme Court noted that persons in custody are sometimes the victims of crime, and as such, it appeared “inadvisable to exclude such inmate/victims from the rights guaranteed by the Arizona Constitution.” Ariz. R. Crim. P. 39, comment (1991). The conflict between the Constitution and the Rule was addressed by the Supreme Court, which held that courts cannot give effect to this provision of Rule 39 because it conflicts with the state constitution to the extent that it grants rights to those who were victimized while in custody. *Stapleford v. Houghton*, 185 Ariz. 560, 562, 917 P.2d 703, 705 (1996).

5. Neighborhoods, Corporations and Other Legal Entities

A neighborhood association may register with the appropriate prosecutorial agency to invoke the rights that are afforded by the VBR and may invoke limited rights in cases of criminal damage, drive-by shootings, prostitution crimes, drug crimes, and chop shops. A.R.S. § 13-4401.01(A),(B).

A corporation, partnership, association or other legal entity has the right to appear and be heard about sentencing and restitution as well as the time, place and date of any such proceeding. A.R.S. § 13-4404. These victims must designate a representative to be the person who will be heard at relevant proceedings. A.R.S. § 13-4401.01(D); § 13-4404(4). The failure to designate a representative may result in a waiver of victims’ rights. Ariz. R. Crim. P. 39(e).

6. Victim Representative

A.R.S. § 13-4403 permits a designated representative to exercise the victim’s rights if the victim is physically or emotionally unable to exercise his or her rights. The court also has the authority

to designate a victim representative if the victim cannot do so himself. A.R.S. § 13-4403(B). The statute sets forth four guidelines for the appointment of a victim representative:

1. Whether there is a relative who would not be so substantially affected or adversely impacted by the conflict occasioned by the allegation of criminal conduct against a member of the immediate family of the minor or vulnerable adult that the relative could not represent the victim.
2. The representative's willingness and ability to do all of the following:
 - (a) Undertake working with and accompanying the minor or vulnerable adult victim through all proceedings, including criminal, civil and dependency proceedings.
 - (b) Communicate with the minor or vulnerable adult victim.
 - (c) Express the concerns of the minor or vulnerable adult victim to those authorized to come in contact with the minor or vulnerable adult as a result of the proceedings.
3. The representative's training, if any, to serve as a minor or vulnerable adult victim's representative.
4. The likelihood of the representative being called as a witness in the case.

A.R.S. § 13-4403(D). In addition to the statutory authority, the trial court has the inherent equitable authority to appoint a representative for a minor victim when the minor's legal guardian is unable or unwilling to adequately represent the minor victim's interests. *State ex rel. Romley v. Dairman*, 208 Ariz. 484, 488, 95 P.3d 548, 552 (App. Div. 1 2004).

III. THE RIGHTS OF THE VICTIM

Victims' rights arise at the time of the defendant's arrest or formal charging. Those rights and duties continue to be enforceable until the final disposition of the charges, including acquittal or dismissal of the charges, all post-conviction release and relief proceedings and the discharge of all criminal proceedings relating to restitution, until it is paid or a criminal restitution order is entered. A.R.S. § 13-4402(A).

However, as discussed in detail in section V, *infra*, those rights may be abrogated when they conflict with the defendant's constitutional rights.

A. Right to Privacy

The victim's right to privacy derives from the VBR's enumerated right to "be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process." Ariz. Const. art. 2, § 2.1(A)(1). The right to privacy has been

interpreted to protect the victim from disclosing identifying facts, including the victim's address, phone number and fingerprints. *Romley v. Schneider*, 202 Ariz. 362, 364, 45 P.3d 685, 687 (App. Div.1 2002). Rule 39 of the Arizona Rules of Criminal Procedure also permits the prosecutor to withhold the name of the victim's employer, unless the defendant can show good cause why disclosure of the information should be made. Ariz. R. Crim. P.39(b)(10). See also A.R.S. §13-4434(A)(requiring the defendant show a "compelling need" for the information).

Law enforcement agencies are also required to redact a victim's contact and identifying information from public records. A.R.S. § 13-4434(B). However, the requirement does not apply to the victim's name, the address where the crime occurred, any records transmitted between law enforcement and the prosecuting agency, and any information the victim consents to release. A.R.S. § 13-4434(C).

The right to privacy is also the constitutional basis for A.R.S. § 13-4433(B), which provides that the defendant, the defendant's attorney or an agent of the defendant shall only initiate contact with the victim through the prosecutor's office.

As with other victims' rights, the defendant's right to gather exculpatory information can take precedence over a victim's constitutional right to privacy under certain circumstances. *State v. Superior Court In and For County of Maricopa*, 186 Ariz. 363, 366, 922 P.2d 927, 930 (App. Div.1 1996).

B. Right to Refuse a Pre-Trial Interview

Victims can refuse interview requests by defense counsel under the VBR. Ariz. Const. art. 2, § 2.1(A)(5); A.R.S. § 13-4433; Ariz. R. Crim. P. 39(b)(11); *State v. Towery*, 186 Ariz. 168, 179, 920 P.2d 290, 301 (1996).

1. Included Offenses

The right to refuse to submit to an interview includes any charged criminal offense witnessed by the victim and that occurred on the same occasion as the offense against the victim, or filed in the same indictment or information or consolidated for trial, that is conducted by the defendant, the defendant's attorney or an agent of the defendant. A.R.S. § 13-4433(A).

2. Witnesses/Uncharged Victims

The victim of an offense for which the defendant had been convicted and was appealing could refuse a pretrial interview in another case brought against the defendant for which the victim was just a witness. However, the VBR does not prevent a defendant from compelling interviews with witnesses who allege that they had been victimized by the defendant, when the state has not yet arrested or charged the defendant for crimes against those witnesses. *State v. Stauffer*, 203 Ariz. 551, 553-54, 58 P.3d 33, 35-36 (App. Div.2 2002).

3. Others Who May Invoke The Right

The right to refuse a pretrial interview also applies to the parent or legal guardian of a child who exercises victims' rights on behalf of that child, A.R.S. § 13-4433(H), and victims who are police officers. *State v. Roscoe*, 185 Ariz. 68, 912 P.2d 1297 (1996)(holding A.R.S. § 13-4433(G) unconstitutional).

4. Conditions on Interview

If the victim consents to an interview, he has the right to impose conditions on the interview, including the time and place of the interview, limitation on questions and when to terminate the interview. A.R.S. § 13-4433(D). The victim may invoke his right to terminate the interview or deposition if the interview is not conducted "in a dignified and professional matter." Ariz. R. Crim. P. 39(b)(12)(ii).

The victim also has the right to name an appropriate support person, including a victim's caseworker, to accompany him at any interview. Ariz. R. Crim. P. 39(b)(9). The victim may be accompanied by a parent or other relative, unless that person will be a witness at trial. Ariz. R. Crim. P. 39(b)(8). If the court finds that a party's claim that a person is a prospective witness was made in bad faith, it may impose sanctions. *Id.*

5. Cross-Examination About Refusal

If the victim refuses a pretrial interview, he may be questioned about it at trial. The court can limit the scope of cross-examination about the refusal and instruct the jury on the victim's constitutional right to refuse the interview. *State v. Riggs*, 189 Ariz. 327, 331, 942 P.2d 1159, 1163 (1997); A.R.S. § 13-4433(F); Ariz. R. Crim. P. 39(b)(11).

6. Limitations on the Right

a. Pre-Trial Testimony

The right to refuse a pretrial interview does not prevent a defendant from subpoenaing a victim to testify at a pretrial hearing. Although requiring the victim to testify gives the defendant access to otherwise unavailable discovery, the examination is conducted in the presence of the court which has the inherent authority to ensure the victim's rights are protected from harassment and intimidation. *State ex rel. Dean v. City Court of City of Tucson*, 173 Ariz. 515, 517, 844 P.2d 1165, 1167 (App. Div. 2 1992).

b. Civil Proceedings

The plain language of the VBR limits the scope of a victim's right to refuse a pretrial interview only by the identity of the person requesting the interview, the defendant or his representative, and the identity of the person to whom the request is directed, i.e. the victim. It does not limit the

proceedings to which the right extends and thus, the victim may refuse a deposition in a civil proceeding against the defendant while the criminal case is ongoing. *State v. Lee*, __ P.3d __, ¶ 10, 2011 WL 115465 (App. Div. 2 2011). But see *Champlin v. Sargeant*, 192 Ariz. 371, ¶ 20, 965 P.2d 763, 767 (1998) (the victim does not have a blanket right to be shielded from all contact with the defendant and his attorney; “those who are not victims but merely witnesses of particular criminal behavior, though perhaps victims of other behavior by the same defendant on separate occasions, may be interviewed as to the former but not the latter.”).

C. Right to Refuse a Discovery Request

Section (A)(5) of the VBR also gives the victim the right to refuse a discovery request. However, this right is not absolute and is one of rights most likely to conflict with the defendant’s constitutional rights. See section V, *infra*, for an explanation of the balancing test the court must undertake when the victim’s constitutional right conflicts with the defendant’s rights.

1. Victim’s Statements

When the victim refuses to grant defendant an interview, the prosecutor cannot be ordered to record all statements between the victim and prosecutor and provide defense counsel with copies of the transcripts of those conversations. *State v. O’Neil*, 172 Ariz. 180, 181, 836 P.2d 393, 394 (App. Div. 2 1991). But see *State ex rel. Romley v. Superior Court In and For County of Maricopa*, 172 Ariz. 232, 836 P.2d 445 (App. Div. 1 1992) (calling the limitation on discovery dicta and refusing to follow all but the holding that the victim can refuse an interview).

2. Medical Records

A request to produce medical records falls within the “other discovery request” in Ariz. Const. art. 2, § 2.1(A)(5) and thus, the victim generally has the right to refuse to make her medical records available to the defense. *State ex rel. Romley v. Superior Court In and For County of Maricopa*, 172 Ariz. 232, 237, 836 P.2d 445, 450 (App. Div. 1 1992). The victim does not waive her rights, or place her medical or behavioral health conditions at issue, merely because she testifies as a witness. *P.M. v. Gould*, 212 Ariz. 541, 549, 136 P.3d 223, 231 (App. Div. 1 2006).

If the defendant can first show a reasonable possibility that the medical records include information to which he is entitled as a matter of due process, the victim may be required to produce his or her records for in camera inspection by the trial court. *State v. Sarullo*, 219 Ariz. 431, 437, 199 P.3d 686, 692 (App. Div. 2 2008); see also *Romley*, 172 Ariz. at 240, 836 P.2d at 453 (if medical records are necessary in order that the defendant’s expert may review them to prepare for impeachment of the victim at trial, court may order production of the records).

D. Rights Relating to the Defendant's Release

1. Right to Be Informed of Release from Custody

The victim has the constitutional right “to be informed, upon request, when the accused or convicted person is released from custody or has escaped.” Ariz. Const. art. 2, § 2.1(A)(2); A.R.S. § 13-4412 (release from custody or escape); A.R.S. § 13-4416 (release from mental health facility). That right includes notification of the defendant's escape and any proposed release, whether prior to or at the expiration of sentence, and even when the proposed release is temporary in nature. Ariz. R. Crim. P. 39(b)(5),(6).

The failure to make reasonable efforts to notify the victim or provide the right to be heard at a post-conviction release hearing allows the victim to seek to set aside the release until the victim is afforded his right to be notified and heard on the issue. A.R.S. § 13-4436(C),(D).

2. Right to Be Heard on Release Issue

The victim also has the right to be heard at any proceeding involving a post-arrest and/or post-conviction release decision. Ariz. Const. art. 2, § 2.1(A)(4),(9); A.R.S. § 13-4414.

The right to be heard on the release issue can be invoked even when the prosecutor decides not to oppose release on bond or personal recognizance. In fact, the prosecutor must inform the victim that he may petition the court to revoke the defendant's bond or recognizance release if the prosecutor decides he will not move to do so. A.R.S. § 13-4432. If the victim moves to revoke bond, he must submit a notarized statement asserting that harassment, threats, physical violence or intimidation against the victim or the victim's immediate family by the defendant or on behalf of the defendant has occurred. *Id.*

A victim whose rights are protected by the VBR may not be required to testify at a release hearing. *Mendez v. Robertson*, 202 Ariz. 128, 131, 42 P.3d 14, 17 (App. Div.2 2002).

3. Terms and Conditions

The custodial agency must inform the victim of the terms and conditions of the defendant's release upon his request for such information. If the defendant appears on summons, the duty to inform the defendant of release conditions falls to the prosecutor. A.R.S. § 13-4407.

E. Right to a Speedy Trial

Although the victim has the right to a speedy trial or disposition and prompt and final conclusion of the case, Ariz. Const. art. 2, § 2.1(A)(10), this provision does not give victims a vested interest in sustaining a conviction on appeal. *State v. Montes*, ___ Ariz. ___, 245 P.3d 879 (2011).

Except in justice and municipal courts, the prosecutor must make reasonable efforts to notify the victim or his attorney of any request for a continuance. A.R.S. § 13-4435(B). The same statute also requires the parties to make a motion to continue in writing.

F. Rights Relating to Defendant's Sentencing

Victims' rights must be provided for in sentencing proceedings conducted by the court and those that are constitutionally required to be undertaken by a jury. *P.M. v. Gould*, 212 Ariz. 541, 545, 136 P.3d 223, 227 (App. Div. 1 2006); *State ex rel. Romley v. Dairman*, 208 Ariz. 484, 488, ¶ 10, 95 P.3d 548, 552 (App. Div. 1 2004). "The victim may present evidence, information and opinions that concern the criminal offense, the defendant, the sentence or the need for restitution at any aggravation, mitigation, presentencing or sentencing proceeding." A.R.S. § 13-4426.

As part of the victim's right to be heard at sentencing, the victim is permitted to submit a written impact statement or make an oral impact statement to the probation officer for the officer's use in preparing a presentence report. A.R.S. § 13-4424(A).

1. Aggravation/Mitigation Hearings

The state's right to obtain information from the victim to prove aggravating circumstances is limited. The Arizona Court of Appeals has ruled that "in weighing a victim's right to confidentiality against the state's interests in proving its case, the state's interest in proving an aggravating factor for sentencing purposes is not as strong as it is for determining guilt." *P.M. v. Gould*, 212 Ariz. 541, 546-47, 136 P.3d 223, 228-29 (App. Div. 1 2006). In order to compel disclosure of information from the victim, the trial court must weigh the following factors: (1) the likelihood that the state can convince a jury to find the aggravating circumstance beyond a reasonable doubt based on other evidence against its need for the victim's confidential information; (2) the state's ability to prove one or more other aggravating factors; and (3) the likelihood of an aggravated sentence against the harm to the victim of disclosure. *Id.* at 548-49; 136 P.3d at 230-31.

2. Victim Impact Statement

To extent allowed by law, victim impact evidence should be considered by the court to rebut a capital-murder defendant's mitigation evidence. *State v. Mann*, 188 Ariz. 220, 228, 934 P.2d 784, 792 (1997). The victim's right to be heard at sentencing is exercised not as a witness. Accordingly, "the victim's statement is not subject to disclosure to the state or the defendant or submission to the court and the victim is not subject to cross-examination." A.R.S. § 13-4426.01.

The presentation of a victim impact statement under A.R.S. § 13-4426.01 does not violate the defendant's Sixth Amendment right of confrontation, even though statement was unsworn and not subject to cross examination; the victim impact statement was not put on by the state, cross

examination was not permitted, and placing the victim under oath was not necessary. *State v. Martinez*, 218 Ariz. 421, 432, 189 P.3d 348, 359 (2008).

The Eighth Amendment to the United States Constitution prohibits a victim from making a sentencing recommendation to the jury in a capital case. *Lynn v. Reinstein*, 205 Ariz. 186, 188, 68 P.3d 412, 414 (2003).

G. Right to Notification

The victim has the right to be notified of his constitutional rights and certain proceedings throughout the course of criminal proceedings against the defendant, if he so requests.

1. Notice of Rights

Section (A)(12) of the VBR gives victims the right to be informed of their constitutional rights. See also A.R.S. § 13-4405 (notification of rights by law enforcement).

Rule 39(a)(1) of the Arizona Rules of Criminal Procedure provides that the rights to be notified and to be heard ceases upon the acquittal of the defendant or upon the dismissal of the charges against the defendant.

2. Defendant's Release

See section III(D), *supra*.

3. Pre-Trial Proceedings

The victim has the right to be present at and, upon request, to be informed of all criminal proceedings where the defendant has the right to be present. Ariz. Const. art. 2, § 2.1(A)(3). That right includes reasonable notice of the date, time and place of the proceeding. Ariz. R. Crim. P. 39(b)(3). See also A.R.S. § 13-4409 (court has five days to notify prosecutor so he can notify victim).

4. Post-Conviction Proceedings

The victim has a right to be informed of his or her right to request notice of post-conviction proceedings concerning the defendant. Ariz. Const. art. 2, § 2.1(A)(12). The prosecutor has 15 days to notify the victim of the sentence imposed. A.R.S. § 13-4411(A). The prosecutor must also inform the victim how to invoke his right to receive notice of post-conviction proceedings. A.R.S. § 13-4411(B).

The victim can receive such notices through the prosecutor's office or the Board of Pardons and Paroles. A.R.S. § 13-4411(D), § 13-4414. However, if the victim has not agreed to use the county attorney as his agent for such notification, the Board of Pardons and Paroles must make

reasonable efforts to locate the victim. *State ex rel. Hance v. Arizona Bd. of Pardons and Paroles*, 178 Ariz. 591, 599, 875 P.2d 824, 832, (App. Div. 1 1993).

5. Other Notices

- Defendant's Arrest. A.R.S. § 13-4405.01.
- Initial Appearance. A.R.S. § 13-4406.
- Pre-trial Notice. A.R.S. § 13-4408. See also section VI(C), *infra*.
- Notice of Conviction, Acquittal or Dismissal. A.R.S. § 13-4410 (prosecutor has 15 days).
- Inmate Mail. A.R.S. § 13-4411.01.
- Prisoner Status. A.R.S. § 13-4413.
- Probation Modification, Termination or Revocation. A.R.S. § 13-4415.
- Petition of Factual Innocence. A.R.S. § 13-4440(B).

6. Duty to Implement Rights

Once the victim has been notified of his rights, he has the duty to inform the prosecutor or other appropriate criminal justice entity (e.g. parole board) that he wishes to claim his notification rights.

To do so, an individual victim must provide his or her full name, address and telephone number to the entity prosecuting the case and to any other entity from which notice is requested by the victim. If the victim is a legal entity, it must designate a representative and give the representative's address and telephone number to the prosecutor. The victim is also obligated to notify the prosecutor in writing of any change in designation. Ariz. R. Crim. P. 39(d).

H. Right to Be Heard

The victim has the right to be heard at any proceeding involving a post-arrest release decision, a negotiated plea, and sentencing, any proceeding when any post-conviction release from confinement is being considered, any pre-trial disposition hearing and sentencing. Ariz. Const. art. II, § 2.1(A)(4),(9); Ariz. R. Crim. P. 39(B)(7). Specifically, the victim has the right to be heard at:

- Initial appearance. A.R.S. § 13-4421.
- Post-arrest custody decisions. A.R.S. § 13-4422.
- Plea negotiation proceedings. A.R.S. § 13-4423.
- Sentencing. A.R.S. § 13-4424, -4426.
- Probation modification, termination and revocation proceedings. A.R.S. § 13-4427.
- Petition of Factual Innocence. A.R.S. § 13-4440(A).

A victim who is out of custody may exercise his right to be heard by appearing personally or by submitting a written statement, an audiotape or videotape at the discretion of the court. A.R.S. § 13-4428; Rule 39(a)(1). If a victim is in custody for an offense, the victim's right to be heard is satisfied through affording the victim the opportunity to submit a written statement, where legally permissible and in the discretion of the court. *Id.* However, the Supreme Court has held that courts cannot give effect to this provision because it conflicts with the state constitution. *Stapleford v. Houghton*, 185 Ariz. 560, 562, 917 P.2d 703, 705 (1996).

I. Miscellaneous Rights

1. Right to Counsel

The victim has the right to be represented by the counsel of his choice in asserting any of his constitutional rights. A.R.S. § 13-4437(A); Ariz. R. Crim. P. 39 (c)(4).

2. Right to Confer with Prosecutor

The victim has the right to confer with the prosecutor about the disposition of a criminal offense, including the victim's views about a decision not to proceed with a criminal prosecution, dismissal, plea or sentence negotiations and pretrial diversion programs. Ariz. Const. art. II, § 2.1(A)(6); A.R.S. § 13-4419(A). However, this does not give the victim the right to direct the prosecution of the case. § 13-4419(C).

3. Right to Be Present

The victim has the right “to be present at and, upon request, to be informed of all criminal proceedings where the defendant has the right to be present.” Ariz. Const. art. 2, § 2.1(A)(3); A.R.S. § 13-4420. This includes the right to be present at an ex parte hearing on mitigation issues for a death penalty defendant where the record is devoid of any argument that the defendant’s constitutional rights would be jeopardized. *Morehart v. Barton*, 225 Ariz. 269, ¶ 11, 236 P.3d 1216, 1220 (App. Div. 1 2010).

The victim also has the right to be included in all bench conferences, chambers meetings, and sessions with the trial court that directly involve any of the victims’ rights enumerated in the Constitution. A.R.S. § 13-4437(D).

4. Right to Leave Work to Attend Proceedings

An employer with 50 or more employees must give a victim time off work to be present at a proceeding or to obtain an order of protection or injunction against harassment for himself or his child. A.R.S. § 13-4439(A). The leave time does not have to be compensated and the employer can require the employee to use some of his personal, sick or vacation leave; A.R.S. § 13-4439(C),(D). However, the employer cannot fire the employee for taking leave pursuant to the statute and is protected from loss of seniority. A.R.S. § 13-4439(B),(E).

5. Right to Inspect Pre-Sentence Report

The victim has the right to inspect any non-confidential part of the pre-sentence report. Ariz. Const. art. 2, § 2.1(A)(7); A.R.S. § 13-4425.

6. Right to Return of Property

If the victim requests the return of his property, the law enforcement agency shall do so as soon as possible or inform the victim why it cannot return it. If the property is admitted into evidence at trial, the court may order its release if a photograph of the property will suffice. A.R.S. § 13-4429.

J. No Right to Refuse to Cooperate

The VBR does not give the victim the right to refuse to testify at the defendant's trial, *S.A. v. Superior Court In and For County of Maricopa*, 171 Ariz. 529, 531, 831 P.2d 1297,1299 (App. Div.1 1992), or pretrial proceeding. *A.H. by Weiss v. Mohave County Superior Court*, 184 Ariz. 627, 629, 911 P.2d 633, 635 (App. Div.1 1996) (victim was compelled to give videotaped testimony of incident for use at mitigation hearing because complete picture of what happened was not in presentence report and was critically important).

Although the victim has the right to refuse a pre-trial interview, that right does not include a right to ignore a lawful subpoena. Consequently, the victim may be subpoenaed by the defendant to testify at pretrial hearing. *State ex rel. Dean v. City Court of City of Tucson*, 173 Ariz. 515,517 844 P.2d 1165, 1167 (App. Div. 2 1992).

The victim may not prevent the state from complying with requests for information within the prosecutor's possession and control. *State ex rel. Romley v. Superior Court In and For County of Maricopa*, 172 Ariz. 232, 239, 836 P.2d 445, 452 (App. Div.1 1992).

K. Waiver of Rights

The victim may waive his rights by failing to keep his address and telephone number current or, for corporations, to designate a representative of the legal entity. A.R.S. § 13-4417; Ariz. R. Crim. P. 39(e). The Arizona Supreme Court included this provision in the Rule because “otherwise, the burden imposed by the notice requirement would be unrealistic.” *Id.*, comment (1991).

L. Standing to Assert Rights

Although the victim has constitutional rights in criminal proceedings, the victim is not a party to those proceedings and thus, does not have the right to, among other things, initiate criminal proceedings against a person or file a petition for review of a trial court's decision on post-

conviction relief. *State v. Lamberton*, 183 Ariz. 47, 50, 899 P.2d 939, 942 (1995). However, the victim does have standing to seek an order, bring a special action or file a notice of appearance in an appellate proceeding to enforce any right or to challenge an order denying any right under the VBR, implementing legislation or court rules. A.R.S. § 13-4437(A).

IV. RESTITUTION

A. Introduction

1. Purpose

The payment of prompt restitution is one of the enumerated victims' rights in the Arizona Constitution, but it has been a statutory requirement prior to the VBR's passage in 1990.

The purpose of the restitution statutes is to make victims whole. *State v. Guilliams*, 208 Ariz. 48, 52, 90 P.3d 785, 789 (App. Div. 2 2004). Consequently, the defendant is required to pay restitution to the victim or his family if the victim is deceased, in the full amount of the economic loss. A.R.S. § 13-603(C).

The judge must order restitution in the full amount of the loss without regard to the defendant's economic circumstances, but the judge may consider the defendant's economic circumstances when setting the manner of payment. *State v. Wilson*, 150 Ariz. 602, 606, 724 P.2d 1271, 1275 (App. Div. 1 1986).

2. Burden of Proof

The state has the burden to prove restitution by a preponderance of the evidence. *In re Stephanie B.*, 204 Ariz. 466, 470, 65 P.3d 114, 118 (App. Div.1 2003).

B. Who is Entitled to Restitution?

A.R.S. § 13-603(C) requires the defendant to make restitution to "the person who is the victim of the crime." The definition of "victim" for restitution purposes is broader than that for other victims' rights purposes.

1. Economic Loss Test

The entitlement to restitution is not determined by the type of offense (i.e. victim or victimless crime), but by the scope the legislature intended to give the term "victim" in the restitution statutes. *State v. Guilliams*, 208 Ariz. 48, 52, 90 P.3d 785, 789 (App. Div. 2 2004). Thus, the test is whether the particular criminal conduct directly caused an economic loss. *Id.* A "victimless crime" may still support an award of restitution so long as the criminal act directly results in economic damages to the person or entity receiving the award. *Id.*

Arizona courts have found persons to be “victims” of a crime for restitution purposes when the offense necessarily involves unlawful interaction with those persons or their property. *State v. Guadagni*, 218 Ariz. 1, 6, 178 P.3d 473, 478 (App. Div. 2 2008), citing e.g., *State v. Wilkinson*, 202 Ariz. 27, 28, ¶ 1, 39 P.3d 1131, 1132 (2002) (contracting without license; contractee victim); *In re William L.*, 211 Ariz. 236, ¶¶ 2-3, 119 P.3d 1039, 1041 (App.2005) (unlawful use of means of transportation; car owner victim); *State v. Guilliams*, 208 Ariz. 48, ¶¶ 3, 15, 90 P.3d 785, 787, 789-90 (App.2004) (attempted escape; state prison victim); *State v. Sorkhabi*, 202 Ariz. 450, ¶¶ 11-13, 46 P.3d 1071, 1074 (App.2002) (resisting arrest; arresting officer victim).

2. Elements of the Crime Irrelevant

“The elements of a crime do not alone determine whether a particular person is entitled to restitution. Rather, the facts underlying a conviction determine whether there are victims of a specific crime as well as the amount of their recoverable loss.” *State v. Guadagni*, 218 Ariz. 1, 6, 178 P.3d 473, 478 (App. Div. 2 2008). See e.g. *In re Stephanie B.*, 204 Ariz. 466, 469, 65 P.3d 114, 117 (App. Div. 1 2003) (restitution for victim’s broken teeth proper even though defendant adjudicated for assault on substantially impaired victim, rather than assault which caused fracture of a body part).

3. Insurers

A victim’s insurance carrier is eligible to recover under restitution statutes if the insurer has indemnified the victim for his losses. *State v. Morris*, 173 Ariz. 14, 16, 839 P.2d 434, 436 (App. Div.1 1992). See section IV(E)(4)(a), *infra*, for information on how a victim’s insurer should be compensated.

4. Others Eligible for Restitution

a. Medical Providers

The trial court has the discretion to order a defendant convicted of the beating death of his child to pay restitution directly to the hospital that treated the child, rather than pay through the child’s mother. *State v. Lopez*, 174 Ariz. 131, 140, 847 P.2d 1078,1087 (1992).

The trial court may also order restitution paid to the Department of Economic Security, for psychological evaluation, counseling, and parent aid for the victim of an attempted child molestation. *State v. Prieto*, 172 Ariz. 298, 836 P.2d 1008 (App. Div. 1 1992).

b. Parents of Minor Victim

A minor victim's parents can receive restitution for attending a court proceeding with the victim. “The policy underlying the award of restitution to a parent when attending court proceedings is that the minor victim is entitled to the support of his or her parent at a time of potentially

significant stress and concern for the child.” *In re Ryan A.*, 202 Ariz. 19, 24-25, 39 P.3d 543, 548-49 (App. Div. 1 2002).

5. Waiver

Generally, restitution is mandatory even if the victim declines to make a request. *State v. Contreras*, 180 Ariz. 450, 454, 885 P.2d 138, 142 (App. Div.1 1994). Nevertheless, the victim can waive the right to restitution but must do so explicitly and cannot waive that right by failing to respond to a letter from the county attorney’s office requesting valuation of losses. *Id.* Additionally, the state does not have the discretion to decline to pursue a restitution order absent a waiver by the victim. *State v. Barrs*, 172 Ariz. 42, 43, 833 P.2d 713, 714 (App. Div.1 1992).

C. For Which Crimes Can The Court Order Restitution?

1. Conviction, Admission, or Agreement

A trial court may impose restitution only on charges for which a defendant (1) has been found guilty, (2) to which he has admitted, or (3) for which he has agreed to pay. *State v. Lewis*, 222 Ariz. 321, 324, 214 P.3d 409, 412 (App. Div. 2 2009).

In cases where the defendant enters a plea agreement in which one or more charges are dismissed, the prosecutor should include an agreement to pay restitution to victims of the dismissed charges. The Arizona Court of Appeals has held that, in the absence of such agreement, where the defendant pled guilty to theft of property stolen from only one victim, the defendant could be ordered to pay restitution to that victim, but not to another victim. *State v. Ferguson*, 165 Ariz. 275, 276, 798 P.2d 413, 414 (App. Div.1 1990).

A defendant may be properly ordered to pay restitution on a dismissed charge when he has consented in a plea agreement, even after the court enters an order setting aside the judgment pursuant to A.R.S. § 13-907. *State v. Zaputil*, 220 Ariz. 425, 429, 207 P.3d 678, 682, (App. Div. 1 2008).

2. Uncharged Crimes

While a trial court may impose restitution for crimes admitted by the defendant but uncharged by the state, *State v. Cummings*, 120 Ariz. 69, 71, 583 P.2d 1389, 1391 (App. 1978), no restitution may be imposed for an uncharged offense that has not been admitted by defendant and for which there is no supporting evidence before the court or for which the defendant has not agreed to pay restitution. *State v. Zierden*, 171 Ariz. 44, 45, 828 P.2d 180, 181 (App.1992); *State v. Reese*, 124 Ariz. 212, 214, 603 P.2d 104, 107 (App. Div.1 1979). It is not enough that the defendant confessed to a police officer that he committed the uncharged crime. In order for the defendant to be ordered to make restitution for such an offense, the admission must be brought to attention of court with guarantees of trustworthiness sufficient to justify the imposition of restitution. Ideally,

the defendant should admit the offense on the record in open court or in a signed writing filed with the court (e.g. plea agreement). *Zierden*, 171 Ariz. at 45, 828 P.2d at 181.

3. Specific Facts of the Crime

As noted above, the entitlement to restitution is not determined by the type of offense (i.e. victim or victimless crime), but by the underlying facts of the crime. *State v. Guilliams*, 208 Ariz. 48, 52, 90 P.3d 785, 789 (App. Div. 2 2004). Consequently, in a leaving the scene of an accident case, the defendant is not required to pay restitution for injuries resulting from the underlying accident unless the defendant's action in leaving the scene aggravated the victim's injuries. *State ex rel. McDougall v. Superior Court In and For County of Maricopa*, 186 Ariz. 218, 220, 920 P.2d 784, 786 (App. Div. 1 1996); *State v. Skiles*, 146 Ariz. 153, 704 P.2d 283 (App. Div.2 1985).

4. Crimes with Monetary Parameters

If the defendant is convicted of an offense with statutorily prescribed monetary parameters (e.g. theft), the restitution ordered by the court is not limited by the statutory maximum amount. *State v. Fancher*, 169 Ariz. 266, 268, 818 P.2d 251, 253 (App. Div. 1 1991).

5. Guilty Except Insane Findings

A finding of guilty except insane is not a “conviction,” within meaning of restitution statutes, and therefore, the defendant does not have to pay restitution. *State v. Heartfield*, 196 Ariz. 407, 410, 998 P.2d 1080, 1083 (App. Div. 2 2000).

D. What losses are recoverable?

1. Economic Loss

When considering the victim’s economic loss, the court must consider all losses caused by the criminal offense or offenses for which the defendant has been convicted. A.R.S. § 13-804(B).

Restitution is appropriate for those losses that (1) are economic, (2) would not have occurred but for the defendant's criminal conduct, and (3) are directly caused by the conduct. *State v. Wilkinson*, 202 Ariz. 27, 29, ¶ 7, 39 P.3d 1131, 1133 (2002).

A.R.S. § 13-105(14) defines “economic loss” as “any loss incurred by a person as a result of the commission of an offense ... includ[ing] lost earnings.” Economic loss does not include losses incurred by the convicted person, damages for pain and suffering, punitive damages or consequential damages. *State v. Lindsley*, 191 Ariz. 195, 198, 953 P.2d 1248, 1251 (App. Div. 1 1997).

Restitution for full economic loss to victim does not include payment of interest on restitution amounts ordered by trial judge as condition of probation. *State v. Foy*, 176 Ariz. 166, 171, 859 P.2d 789, 794 (App. Div.1 1993).

a. Direct Losses

Restitution is available for direct, but not indirect economic losses. In order to prove direct loss, the government must show (1) that a particular loss would not have occurred but for the conduct underlying the offense of conviction, and (2) that the causal nexus between the conduct and the loss is neither factually nor temporally attenuated. *State v. Williams*, 208 Ariz. 48, 53, 90 P.3d 785, 790 (App. Div. 2 2004).

b. Consequential Losses

“Consequential damages are such as are not produced without the concurrence of some other event attributable to the same origin or cause; such damage, loss, or injury as does not flow directly and immediately from the action of the party, but only from the consequences or results of such act. The term may include damage which is so remote as not to be actionable.” *State v. Slover*, 220 Ariz. 239, 242-43, 204 P.3d 1088, 1091-92 (App. Div.2 2009).

c. Victim’s Fault Irrelevant

An assault victim is entitled to an award of restitution, even if the victim was partially at fault for her own injury because she supplied alcoholic beverages to defendant. *State v. Clinton*, 181 Ariz. 299, 300, 890 P.2d 74, 75 (App. Div.1 1995).

2. Specific Recoverable Losses

a. Costs Associated with Victim’s Attendance at Trial

Wages lost due to voluntary or involuntary attendance at trial are recoverable. *State v. Guadagni*, 218 Ariz. 1, 6, 178 P.3d 473, 478 (App. Div. 2 2008); *State v. Lindsley*, 191 Ariz. 195, 198, 953 P.2d 1248, 1251 (App. Div. 1 1997).

A reasonable food expense per diem related to the victim’s attendance at trial is recoverable. *State v. Madrid*, 207 Ariz. 296, 300, 85 P.3d 1054, 1058 (App. Div.1 2004).

Reasonable expenses associated with attendance of victim's children at murder trial qualified as economic losses. *State v. Madrid*, 207 Ariz. 296, 298, 85 P.3d 1054, 1056 (App. Div.1 2004).

Pre-paid educational fees paid by victim, who was unable to attend one session of six-week culinary class due to the assault, were economic losses for restitution purposes. The victim's inability to attend the class was related to “the consumption of goods and services,” because the

class was a service for which he had paid and was precluded from consuming. *In re Andrew C.*, 215 Ariz. 366, 369, 160 P.3d 687, 690 (App. Div. 1 2007) .

Annual leave pay for minor victim's father to attend a deposition hearing. *In re Ryan A.*, 202 Ariz. 19, 25, 39 P.3d 543, 549 (App. Div. 1 2002).

b. Funeral and Estate Expenses

Homicide victim's family's funeral and travel expenses and customary and reasonable attorney's fees incurred to close victim's estate are proper items for restitution. *State v. Spears*, 184 Ariz. 277, 292, 908 P.2d 1062, 1077 (1996).

As restitution, trial court properly ordered defendant to pay for travel expenses and lost wages to victim's daughter who was required to come to Arizona to settle her mother's affairs. *State v. Baltzell*, 175 Ariz. 437, 439, 857 P.2d 1291, 1393 (App. Div.1 1992). But see *State v. Wideman*, 165 Ariz. 364, 369, 798 P.2d 1373, 1378 (App. Div. 1 1990) (improper to award travel expenses when appearance of victim's family at court proceedings was voluntary).

c. Future Losses

Victim's future medical care and future lost wages are recoverable. *State v. Howard*, 168 Ariz. 458, 459, 815 P.2d 5, 6 (App. Div.1 1991).

A defendant convicted of endangerment for driving under the influence and causing an accident could be ordered to pay victim's expenses for rental cars, taxi fares, and related telephone calls to insurance carrier because they were a natural consequence of the defendant's damage to the victim's automobile. *State v. Morris*, 173 Ariz. 14, 19, 839 P.2d 434, 439 (App. Div.1 1992).

d. Attorney's Fees

A homicide victim's family may recover reasonable attorney's fees incurred to close the victim's estate. *State v. Spears*, 184 Ariz. 277, 292, 908 P.2d 1062, 1077 (1996).

However, attorney fees that deceased victim's wife incurred, where attorney acted in the role of an "adjunct prosecutor" constituted consequential damages which were not recoverable. *State v. Slover*, 220 Ariz. 239, 243, 204 P.3d 1088, 1092 (App. Div.2 2009).

e. Pain and Suffering/Medical Expenses

"Pain and suffering does not constitute an economic loss. The costs of alleviating the results of pain and suffering are an economic loss." Thus, the defendant can be ordered to pay the victim's medical expenses for the counseling directly attributable to the defendant's crime. *State v. Wideman*, 165 Ariz. 364, 369, 798 P.2d 1373, 1378 (App. Div.1 1990).

f. Lost Profit

Lost profit is recoverable in a retail theft case where the defendant deprived the store of the proceeds of sales as well as inventory. *State v. Young*, 173 Ariz. 287, 842 P.2d 1300 (App. Div.1 1992).

3. Specific Consequential Losses

In a theft case, the victim may recover for loss of the property or its value, but not the resulting breach of the lease or lost profits. *State v. Pearce*, 156 Ariz. 287, 289, 751 P.2d 603, 605 (App. Div.2 1988).

Motel owner is not entitled to cleaning costs incurred as a result of a sexual assault committed on the premises. *State v. French*, 166 Ariz. 247, 248-49, 801 P.2d 482, 483-84 (App.1990) .

The state is not entitled to recoup the cost of prosecution. *State v. Maupin*, 166 Ariz. 250, 253, 801 P.2d 485, 488 (App. Div. 1 1990).

E. How Is The Amount of Restitution Calculated?

1. Must Present Evidence of Victim's Actual Loss

Unless the parties have agreed to a specific amount of restitution the defendant will pay, the court cannot order restitution without some evidence as to the amount of the victim's loss. *State v. Scroggins*, 168 Ariz. 8, 9, 810 P.2d 631, 632 (App. Div.1 1991). The restitution order must reflect the loss the victims actually suffered. *State v. Proctor*, 196 Ariz. 557, 567, 2 P.3d 647, 657 (App. Div.2 1998) (defendant credited for lowered value of property and payments he made on the promissory note). An order that simply requires the defendant to pay the maximum amount of restitution is improper. *Scroggins*, 168 Ariz. at 9, 810 P.2d at 632.

2. Modified But-for Causation Standard

As noted above, restitution is available only for direct economic losses. The standard for establishing causation on a restitution claim is a modified but-for standard. The state must prove that a particular economic loss would not have occurred but for the conduct underlying the offense for which the defendant was convicted.

Moreover, to ensure consequential losses are not compensated, the state must show that the causal nexus between the conduct and the loss is not too attenuated either factually or temporally. Whether such a showing has been made is a fact-specific determination for the court. *State v. Lewis*, 222 Ariz. 321, 325, 214 P.3d 409, 413 (App. Div.2 2009).

3. Valuation of Property or Goods

Typically, the court must measure the victim's economic loss by assessing the fair market value of the property at the time of the loss. *State v. Ellis*, 172 Ariz. 549, 551, 838 P.2d 1310, 1312 (App. Div.1 1992). Evidence on fair market value may include, among other things, whether the property was new when purchased, the original purchase price, how much time the owner has had the use of the property and the condition of the property at the time of the theft. *Id.*

However, the court has the discretion to use other measures when fair market value will not make the victim whole. In cases where property immediately depreciates, such as with new automobiles or clothing, the court may consider the original purchase price or replacement cost in determining the victim's economic loss. *State v. Ellis*, 172 Ariz. 549, 551, 838 P.2d 1310, 1312 (App. Div.1 1992). In some cases where the actual missing items cannot be identified, the court may assign the average price value of the missing inventory as a reasonable basis for calculation of loss. *State v. Young*, 173 Ariz. 287, 842 P.2d 1300 (App. Div.1 1992).

4. Credits and Offsets

To avoid a windfall to the victims, the restitution amount should be offset by any recovery. See *Town of Gilbert Prosecutor's Office v. Downie ex rel. County of Maricopa*, 218 Ariz. 466, 469, 189 P.3d 393, 396 (2008); *State v. Ferguson*, 165 Ariz. 275, 798 P.2d 413 (App. Div. 1 1990) (amount of restitution for stolen property must be reduced by value of items police had recovered and returned to victims).

It should go without saying that by paying restitution to the victim of stolen goods, the defendant does not get to keep any unclaimed property. Nevertheless, someone tried that argument and lost. *State v. Freeman*, 174 Ariz. 303, 306, 848 P.2d 882, 885 (App. Div.1 1993).

a. Direct Victims and Their Insurers

When the victim will be at least partially compensated for his loss by his insurance company, the court should award the insurer the amounts it has already paid for the victim's medical expenses, and award the victim his own out-of-pocket costs as well as any unpaid medical expenses. *State v. Steffy*, 173 Ariz. 90, 94, 839 P.2d 1135, 1139 (App. Div. 1 2002). If the insurer subsequently covers those unpaid medical expenses, it may, as a "victim," pursuant to A.R.S. § 13-804(I), petition the court at that time, based on a change of circumstances, to modify the manner in which defendant's monthly payments are made so that the insurer is reimbursed for the insured amounts rather than the victim. *State v. Steffy*, 173 Ariz. 90, 95, 839 P.2d 1135, 1140 (App. Div. 1 2002).

b. Civil Suit Recovery

In some cases, the victim and defendant will engage in civil litigation over the conduct underlying the offense for which the defendant was convicted. If the parties settle the civil matter, the criminal trial court is not automatically foreclosed from ordering some restitution simply because the victim was awarded compensation in the civil action. *State v. Iniguez*, 169 Ariz. 533, 536, 821 P.2d 194, 197 (App. Div. 1 1991).

If the civil lawsuit is settled, the settlement may extinguish all or part of the defendant's restitution obligation. The court should determine to what degree the settlement compensates the victim for his economic loss and give the defendant a corresponding offset against the ordered restitution. *State v. Andersen*, 177 Ariz. 381, 387, 868 P.2d 964, 970 (App. Div.1 1993); *Iniguez*, 169 Ariz. at 537, 821 P.2d at 198.

5. Anticipated Expenses and Credits

In some cases, the defendant's sentencing will take place before the full extent of the victim's economic loss is known. Arizona courts have held that public policy is best served by placing the initial burden of payment on defendant who caused the economic loss. *State v. Steffy*, 173 Ariz. 90, 95, 839 P.2d 1135, 1140 (App. Div. 1 2002). Consequently, in cases where there are future anticipated expenses, such as future medical costs or loss of wages, the trial court should award for future anticipated expenses with the caveat that the amounts would be adjusted downward if the victim's expenses prove to be less than anticipated. *State v. Steffy*, 173 Ariz. 90, 95, 839 P.2d 1135, 1140 (App. Div. 1 2002).

F. When Can Restitution Be Ordered Or Modified?

1. Oral Pronouncement of Sentence

Restitution is part of the defendant's sentence and must be set forth in the oral pronouncement of sentence. If, for some reason, the court fails to set forth the amount of restitution in the oral pronouncement, the error cannot be corrected by inclusion of the restitution amount in the sentencing minute entry; the court must correct the record in open court with the defendant present. *State v. Barrs*, 172 Ariz. 42, 833 P.2d 713 (App. Div.1 1992).

2. Manner of Payment

The court must consider the defendant's economic circumstances in deciding the manner in which restitution is to be paid. A.R.S. § 13-804(E); *State v. Hovey*, 175 Ariz. 219, 220, 854 P.2d 1205, 1206 (App. Div.1 1993)(court erred in failing to consider defendant's job loss when it increased the rate at which restitution was to be paid).

The defendant is still required to make restitution payments during an appeal but the clerk's disbursement to the victim is stayed during pendency of the appeal. A.R.S. § 13-804(D); *State v. Hansen*, 215 Ariz. 287, 289, 160 P.3d 166, 168 (2007).

A.R.S. § 31-230(C) requires DOC to withdraw on a monthly basis anyway from 20% to 50% of the money available in the account to pay the court ordered restitution. That includes any monies deposited into the inmate's spendable account that are a “gift” from a family member who expressly requests the deposits not be used for restitution. *State v. Glassel*, ___ P.3d ___, 2011 WL 701309 (March 1, 2011).

3. Post-Conviction and Sentencing

The trial court retains jurisdiction of the case for purposes of modifying the manner in which court-ordered payments are made until paid in full or until the defendant's sentence expires. A.R.S. § 13-805(A). Additionally if, at the time the court suspends imposition of sentence and places the defendant on probation, it was aware of the victim's economic loss but lacked sufficient evidence to support a restitution order, it can subsequently order restitution:

- During the term of probation, even if there is no pending petition to revoke or modify the defendant's conditions of probation. *State v. Contreras*, 180 Ariz. 450, 453, 885 P.2d 138, 141 (App. Div.1 1994).
- When probation is revoked and the defendant is sentenced to prison term. *State v. Holguin*, 177 Ariz. 589, 870 P.2d 407 (App. Div.1 1993).
- While defendant is incarcerated. *State v. Moore*, 156 Ariz. 566, 567, 754 P.2d 293, 294 (1988).
- After the defendant's release from incarceration, if the defendant's economic circumstances warrant it. *State v. Currie*, 150 Ariz. 59, 61, 721 P.2d 1186, 1188 (App. Div.1 1986).

If the victim was not previously notified of the right to restitution, he may seek to enforce the right at any time. A.R.S. § 13-4436(B).

4. Post-Completion of Sentence

a. Criminal Restitution Order

If a defendant has not paid all restitution prior to the completion of his sentence, the court may reduce the outstanding balance to a criminal restitution order (CRO). A.R.S. § 13-805(A) provides, in pertinent part:

At the time the defendant completes the defendant's period of probation or the defendant's sentence, the court shall enter both:

- (1) A criminal restitution order in favor of the state for the unpaid balance, if any, of any fines, costs, incarceration costs, fees, surcharges or assessments imposed, and;
- (2) A criminal restitution order in favor of each person entitled to restitution for the unpaid balance of any restitution ordered.

A CRO may not be entered against the defendant at the time of sentencing. It can only be applied at the end of the defendant's sentence or period of probation. *State v. Lewandowski*, 220 Ariz. 531, 535, 207 P.3d 784, 788 (App. Div. 2 2009).

If the court fails to enter a CRO "at the time" the defendant completes his probation or sentence, the non-compliance will not, by itself, bar entry of or invalidate an otherwise proper CRO. *State v. Unkefer*, 225 Ariz. 430, 239 P.3d 749, 753 (App. Div. 1 2010). In determining whether a CRO was entered within a reasonable time after a defendant completes his sentence, the trial court should consider the totality of the circumstances, including (1) the length of the delay, (2) the reason for the delay, (3) the parties responsible for the delay, (4) the effect of the delay, (5) any demonstrated prejudice suffered by the defendant, and (6) whether any prejudice can be mitigated or cured by, for example, shifting the burden of proving offsets to restitution to the state. *Id.* at __, 239 P.3d at 754.

b. Express Retention of Jurisdiction

If the victim makes a timely claim for restitution, the trial court may expressly retain jurisdiction over the claim, permitting it to adjudicate the claim even after the defendant completes probation. *State v. Zaputil*, 220 Ariz. 425, 429, 207 P.3d 678, 682 (App. Div.1 2008).

5. Bankruptcy of the Defendant

The defendant's obligation to pay restitution cannot be discharged in bankruptcy. *State v. West*, 173 Ariz. 602, 608, 845 P.2d 1097, 1103 (App. Div. 1 1992).

6. Death of the Defendant

If the defendant dies after being ordered to pay restitution to the victim, the restitution order, even one which is allocated portion of "fine," survives the defendant's death. *Matter of Estate of Vigliotto*, 178 Ariz. 67,69, 870 P.2d 1163, 1165 (App. Div. 2 1993).

G. What are the Defendant's Rights Regarding Restitution?

1. Knowing and Intelligent Agreement to Pay

A defendant cannot voluntarily and intelligently enter a plea agreement without knowing the amount of restitution to be paid. *State v. King*, 157 Ariz. 508, 510, 759 P.2d 1312, 1314 (1988). The mere knowledge that restitution can be ordered to compensate the victim's "full economic loss" is insufficient to meet that requirement. *State v. Crowder*, 155 Ariz. 477, 479, 747 P.2d 1176, 1178, (1987), citing *State v. Phillips*, 152 Ariz. 533, 535, 733 P.2d 1116, 1118 (1987).

A defendant's agreement to pay restitution is knowing and voluntary only if the record contains at least one of the following: (1) a statement in the plea agreement setting the specific dollar amount of restitution; (2) a statement indicating an agreement to pay a specific dollar amount of restitution; or (3) a warning by the judge prior to accepting the defendant's plea that he can order restitution of a specific dollar amount. The court can advise the defendant of the restitution obligation in an open-ended manner (i.e. "up to \$5000"). *State v. Dampier*, 157 Ariz. 222, 224, 756 P.2d 319, 321 (App. Div. 1 1987). Advising a defendant of the maximum fine he can be ordered to pay will not meet this requirement. *Id.*

It is imperative that the prosecutor ensures this requirement is met, because the failure to do so is severe. If the state and/or court fails to properly advise a defendant of his restitution obligation, the remedy is to vacate the conviction and sentence. *Id.* at 226, 756 P.2d at 323.

2. Right to a Hearing

The defendant has the right to request a hearing regarding the amount of restitution or the manner in which it should be paid. A.R.S. § 13-804(G); *State v. Scroggins*, 168 Ariz. 8, 9, 810 P.2d 631, 632 (App. Div. 1 1991). A defendant must object to the requested restitution or request a hearing on the issue at sentencing. If he does not object, he may waive his right to be heard. *State v. Steffy*, 173 Ariz. 90, 93, 839 P.2d 1135, 1138 (App. Div. 1 2002). However, if the defendant withdraws his request for a restitution hearing after the court indicates that it will permit the state to withdraw from the plea agreement if the defendant insists on a hearing, the waiver will be considered involuntary. *State v. Taylor*, 158 Ariz. 561, 565, 764 P.2d 46, 50 (App. Div.1 1988).

A restitution hearing is a criminal proceeding and, therefore, defendant is entitled to counsel. *State v. Guadagni*, 218 Ariz. 1, 7, 178 P.3d 473, 479 (App. Div. 2 2008).

H. What if the Defendant Fails to Pay Court-Ordered Restitution?

If a defendant defaults in the payment of court-ordered restitution or of any installment thereof, the clerk of the court must notify the prosecutor and the sentencing court on a monthly basis. A.R.S. § 13-810(B). The court, on motion of the prosecutor or victim, shall require the defendant

to show cause why the default should not be treated as contempt. *Id.* At the show cause hearing, the defendant may be questioned about his financial condition, employment, assets or on any other matter relating to his ability to pay restitution. A.R.S. § 13-810(C).

If the court finds that the defendant willfully failed to restitution or that the defendant intentionally refused to make a good faith effort to obtain the monies required for the payment, the court shall hold the defendant in contempt and may: (1) jail the defendant until the restitution or any specified part thereof is paid; (2) revoke the defendant's probation, parole or community supervision and sentence the defendant to prison, or; (3) enter a garnishment order pursuant to A.R.S. § 13-812.

If, however, the court finds the failure to pay restitution was not willful and that the defendant cannot pay despite sufficient good faith efforts to obtain the money, the court may: (1) modify the manner in which the restitution is to be paid; (2) enter “any reasonable order that would assure compliance with the order to pay,” or; (3) enter a garnishment order.

I. Appellate Review

Generally, an appellate court reviews a restitution order for an abuse of discretion. *State v. Lewis*, 222 Ariz. 321, 324, 214 P.3d 409, 412 (App. Div. 2 2009). An appellate court views the evidence bearing on a restitution claim in the light most favorable to sustaining the trial court's order. *Id.* When an appellate court cannot determine the basis of a restitution order from the record, the proper remedy is to vacate that portion of the sentence and remand to the trial court to reconsider the propriety of the restitution order and to specify the basis for its determination. *State v. Guilliams*, 208 Ariz. 48, 90 P.3d 785 (App. Div. 2 2004).

V. CONFLICT BETWEEN THE DEFENDANT’S AND VICTIM’S RIGHTS

When the defendant's constitutional right to due process directly conflicts with the Victim's Bill of Rights, Arizona courts have held that federal due process is the superior right and must prevail over the victim's rights in the state constitution. *State ex rel. Romley v. Maricopa County Superior Court*, 172 Ariz. 232, 236, 836 P.2d 445, 449 (App. Div. 1 1992).

A. Right to Exculpatory Evidence

Under certain circumstances, the defendant's right to gather exculpatory information can take precedence over a victim's constitutional right to privacy. *State v. Superior Court In and For County of Maricopa*, 186 Ariz. 363, 366, 922 P.2d 927, 930 (App. Div.1 1996).

When a conflict exists between the victim’s right to refuse a discovery request and the defendant’s due process or confrontation rights, the court must balance the interests. *State ex rel. Romley v. Maricopa County Superior Court*, 172 Ariz. 232, 240, 836 P.2d 445, 453 (App. Div.1

1992). In such cases, an in camera inspection of requested discovery may allow the trial court to weigh the appropriate factors in deciding whether to grant a discovery request. *Id.*

B. Right to Confront Witnesses

Where the victim of an offense to which the defendant pleaded guilty made a statement at the sentencing hearing, the defendant had the right to cross-examine the victim, regardless of whether statement was sworn. *State v. Blackmon*, 184 Ariz. 196, 198, 908 P.2d 10, 12 (App. Div.1 1995).

Nevertheless, trial judges have wide latitude to impose reasonable limits on cross-examination “based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witnesses' safety, or interrogation that is repetitive or only marginally relevant.” *State ex rel. Romley v. Maricopa County Superior Court*, 172 Ariz. 232, 240, 836 P.2d 445, 453 (App. Div.1 1992). Restrictions on the defendant’s access to information “essential to preparation for effective, reasonable cross-examination or impeachment of the victim ... must be proportionate to the interest of protecting the victim as balanced against the defendant's due process right to a fundamentally fair trial.” *Id.*

VI. THE ROLE OF THE PROSECUTOR

A. Not the Victim’s Representative

The victim has the right to the assistance of the prosecutor in the assertion of his constitutional rights. Ariz. R. Crim. P. 39(c)(1). However, the prosecutor does not represent the victim. Thus, there is no conflict of interest requiring disqualification of a prosecutor from criminal prosecution of a defendant based on the prosecution of criminal charges against the victim arising out of an incident unrelated to the charges against the defendant. *State ex rel. Romley v. Superior Court In and For County of Maricopa*, 181 Ariz. 378, 382, 891 P.2d 246, 250 (App. Div.1 1995).

Moreover, although the victim has the right to confer with the prosecutor about the case, this right does not mean the victim can dictate how that case will be prosecuted. A.R.S. § 13-4419(C). At times, this may lead to conflicts of interest between the prosecutor and the victim. In the event of a conflict, the prosecutor has the responsibility to direct the victim to the appropriate legal referral, legal assistance, or legal aid agency. Ariz. R. Crim. P. 39(c)(3).

B. Standing to Assert the Victim’s Rights

Once the victim notifies the state that he wishes to invoke his rights, the prosecutor has standing to assert those rights on behalf of the victim without getting specific authorization for each proceeding. A.R.S. § 13-4437(C); Ariz. R. Crim. P. 39(c)(2). The VBR does not require the

prosecutor to obtain a victim's consent before filing each motion or petition to enforce the asserted rights. *State v. Lee*, __ P.3d __, ¶ 6, 2011 WL 115465 (App. Div. 2 2011).

C. Duties of the Prosecutor

The prosecutor has the responsibility to inform the victim of his rights, and to provide the victim with notices and information to which he is entitled. Ariz. R. Crim. P. 39(c)(1). The prosecutor has seven days after the defendant has been charged to give the victim notice of: (1) the victim's constitutional rights; (2) the charges against the defendant and a clear and concise statement of the procedural steps involved in a criminal prosecution; (3) how the victim can invoke his right to confer with the prosecuting attorney; and (4) the person in the prosecutor's office to contact for more information. A.R.S. § 13-4408(A).

With regard to the victim's right to refuse an interview, the prosecutor must promptly inform the victim of the defendant's request for an interview and advise the victim of his right to refuse the interview. A.R.S. § 13-4433(B).

If the prosecutor decides he will not move to revoke a defendant's bond or personal recognizance release, he must inform the victim that he may petition the court to revoke the defendant's bond or recognizance release if the prosecutor decides he will not move to do so. A.R.S. § 13-4432.

Sometimes, a defense attorney will ask a prosecutor to forward correspondence to the victim. The prosecutor is not required to do so. A.R.S. § 13-4433(C).

If the prosecutor records communications with victims or the communications between the victim and prosecutor reveal discoverable information, the communications must be disclosed to the defendant, even if the victim exercises his right not to be interviewed by the defendant. *State v. O'Neil*, 172 Ariz. 180, 182, 836 P.2d 393, 395 (App. Div.2 1991). However, communications between the victim advocate and the victim are privileged. A.R.S. § 13-4430.

VII. DUTIES OF THE COURT

Rule 39(f) sets forth the court's obligation with regard to implementation of victims' rights:

Court Enforcement of Victim Notice Requirements

1. At the commencement of any proceeding which takes place more than seven days after the filing of charges by the prosecutor and at which the victim has a right to be heard, the court shall inquire of the prosecutor or otherwise ascertain whether the victim has requested notice and been notified of the proceeding.
2. If the victim has been notified as requested, the court shall further inquire of the prosecutor whether the victim is present. If the victim is present and the

prosecutor advises the court that the victim wishes to be addressed by the court, the court shall inquire whether the victim has been advised by the prosecutor of the rights conferred by this rule. If the victim has not been so advised, the court shall recess the hearing and the prosecutor shall immediately comply with subsection (c)(1) of this rule. The court shall also provide the victim with a written list of the victims' rights enumerated in subsection (b) of this rule.

A.R.S. § 13-4438 further requires the court to make the following specific statement of rights at the beginning of any proceeding:

If you are the victim of a crime with a case pending before this court, you are advised that you have rights to justice and due process under Arizona law that, among others, include the right to be treated with fairness, respect and dignity, to a speedy trial and a prompt and final conclusion of the case, to be present at court proceedings, to choose whether or not to be interviewed by the defendant or the defendant's attorney, to be heard before the court makes a decision on release, negotiation of a plea, scheduling and sentencing and to receive restitution from a person who is convicted of causing your loss. If you have not already been provided with a written statement of all victims' rights, please contact the victim services division of the prosecutor's office.

The court is also obligated to minimize contact between the victim, the victim's immediate family and the victim's witnesses and the defendant, the defendant's immediate family and defense witnesses before, during, and immediately after court proceedings. A.R.S. § 13-4431.

VIII. FAILURE TO COMPLY WITH VICTIMS' RIGHTS

A. Reconsideration of Ruling

Rule 39(e) enhances effective enforcement of victims' rights because it requires the court to inquire, at the start of a proceeding, whether the victim has requested notice and been notified. Moreover, the comment to the Rule suggests the court has an affirmative duty to determine whether its rulings are compliant with victims' rights. "If a court should discover, after ruling on a matter, that a victim entitled to notice did not receive it, the court should ordinarily have discretion to reconsider its ruling, if it is appropriate and constitutional to do so." Ariz. R. Crim. P. 39, comment (1991).

B. Reexamination Hearing

The failure to comply with a victim's right is a ground for the victim to request a reexamination proceeding within ten days of the proceeding at which the right was denied. A.R.S. §13-4436(A). The proceeding must begin no more than 30 days after the parties have been given notice of the victim's request. A.R.S. § 13-4436(E).

In most cases, the court must reconsider any decision that arises from a proceeding in which the victim's right was not protected. However, the failure to comply with a victim's right does not provide grounds for a new trial or to set aside a conviction after trial. A.R.S. § 13-4436(B). Additionally, "a victim who was given notice of a plea or sentencing proceeding may make a motion to reopen a plea or sentence only if the victim was not voluntarily absent from the proceeding and has asserted the right to be heard before or during the proceeding at issue and the right to be heard was denied and, in the case of a plea, the accused has not pled to the highest offense charged." A.R.S. § 13-4436(B).

C. Recovery of Damages

If a governmental entity has intentionally, knowingly, or grossly negligently violated the victim's rights, the victim may recover damages from that government entity, unless any immunity provision provided for under common law or statute prohibits it. A.R.S. § 13-4437(B).